

1 Honorable Marsha J. Pechman
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UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 BOILERMAKERS NATIONAL ANNUITY
10 TRUST, On Behalf of Itself and All Others
Similarly Situated,

11 Plaintiff,

12 v.

13 WAMU MORTGAGE PASS-THROUGH
14 CERTIFICATES, SERIES 2006-ARI, *et al.*,

15 Defendants.

16 No. C09-0037 (MJP)

17 MOTION OF BOILERMAKERS
18 NATIONAL ANNUITY TRUST, NEW
19 ORLEANS EMPLOYEES' RETIREMENT
20 SYSTEM AND MARTA/ATU LOCAL 732
EMPLOYEES RETIREMENT PLAN FOR
APPOINTMENT OF LEAD PLAINTIFFS
AND APPROVAL OF LEAD COUNSEL;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF

NOTE ON MOTION CALENDAR:
April 3, 2009

21 NEW ORLEANS EMPLOYEES'
22 RETIREMENT SYSTEM and MARTA/ATU
23 LOCAL 732 EMPLOYEES RETIREMENT
24 PLAN, Individually and on Behalf of All Others
Similarly Situated,

Plaintiff,

v.

WASHINGTON MUTUAL BANK, *et al.*,

Defendants.

No. C09-00134 (RSM)

MOTION FOR APPOINTMENT OF LEAD PLAINTIFFS
AND APPROVAL OF LEAD COUNSEL; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT THEREOF
Case Nos. C09-0037 (MJP) / C09-00134 (RSM)

010094-11 291398 V1

The Boilermakers National Annuity Trust (“Boilermakers”), New Orleans Employees’ Retirement System (“New Orleans”) and MARTA/ATU Local 732 Employees Retirement Plan (“MARTA/ATU”) (collectively, “Plaintiffs” or “Movants”), hereby move, pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1, for appointment of Lead Plaintiffs and for approval of Schoengold Sporn Laitman & Lometti, P.C. (“SSLL”), Labaton Sucharow LLP (“Labaton”) and Barroway Topaz Kessler Meltzer & Check, LLP (“BTKMC”) as Lead Counsel for the Class and Hagens Berman Sobol Shapiro LLP (“HBSS”) as Liaison Counsel for the Class.

I. INTRODUCTION

The complaints filed in these actions¹ allege violations of Sections 11, 12 and 15 of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (“Securities Act”) on behalf of purchasers of Washington Mutual Mortgage Pass-Through Certificates (the “Certificates” or the “WaMu Certificates”) who purchased the Certificates, backed by pools of residential mortgage loans, pursuant to or traceable to a Registration Statement filed by Washington Mutual Asset Acceptance Corporation, in a series of public offerings of Mortgage Pass-Through Certificates (“MPTC”) from January 2006 through July 2007 issued by the Defendant Issuer Trusts (collectively, the “Offerings” or the “WaMu Offerings”).

The Certificates were issued pursuant to a common Registration Statement filed with the Securities Exchange Commission (“SEC”) in or around January 2006 (the “Registration Statement”). The Offerings occurred in this venue. The Certificates herein are Mortgage Pass-Through Certificates collateralized by mortgages originated principally by Washington Mutual

¹ A motion for consolidation of these two actions, *Boilermakers National Annuity Trust, et al. v. WaMu Mortgage Pass-Through Certificates Series 2006-ARI, et al.*, C09-0037 (MJP) (the “Boilermakers Action”) and *New Orleans Employees Retirement System, et al. v. Washington Mutual Bank, et al.*, C09-00134 (RSM) (the “New Orleans Action”), was filed by Defendants WaMu Capital Corporation, Washington Mutual Asset Acceptance Corporation and the Individual Defendants on February 19, 2009. Said motion is unopposed by all parties herein, except Defendant Federal Deposit Insurance Corporation (“FDIC”), as receiver for Defendant Washington Mutual Bank.

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1 Bank, F.S.B. (“WMB”) as well as various third-party mortgage loan originators, each of which at
 2 all relevant times were commercial and residential lenders. The mortgages and liens on the
 3 mortgaged properties constituting the Certificates collateral were, as set forth in the
 4 Prospectuses, to be the principal source by which Certificate purchasers were to obtain
 5 repayment of their investment, plus interest. As also set forth in the Registration Statements, the
 6 Certificate collateral was purportedly originated pursuant to specific underwriting procedures
 7 and guidelines.

8 The Underwriter for the Offerings was Washington Mutual Capital Corporation
 9 (“WMCC” or the “Underwriter”). The Underwriter was obligated to conduct meaningful due
 10 diligence to ensure that the Registration Statement contained no material misstatements and
 11 omissions, including as related to the stated manner in which the mortgages had been originated.
 12 The Underwriter received substantial fees for its work in connection with the Offerings. At the
 13 time of the Offerings, the Certificates were issued at or around par value.

14 The Boilermakers Action was first filed in United States District Court for the Western
 15 District of Washington on January 12, 2009. A PSLRA notice was published pursuant to the
 16 Private Securities Litigation Reform Act of 1995 (the “PSLRA”) in a national business-oriented
 17 wire service on January 14, 2009 (*See Declaration of Steve Berman in Support of Motion for*
 18 *Appointment of Lead Plaintiffs and Approval of Lead Counsel (the “Berman Decl.”), Exhibit*
 19 *(“Ex.”) A*). This motion is being filed within 60 days from the date of publication of that first
 20 notice.

21 The New Orleans Action was initially filed on or about August 4, 2008, in Washington
 22 State, King County Superior Court, Case No. 08-2-26210-3 SEA, and was assigned to the
 23 Honorable Michael J. Trickey (the “King County Action”). Thereafter, on December 16, 2008,
 24 Plaintiffs New Orleans and MARTA/ATU filed a First Amended Complaint in the King County
 25 Action. On January 29, 2009, Defendants filed a Notice of Removal to remove the King County
 26 Action to Federal District Court, which was assigned Docket No. 09-cv-00134 (RSM). A

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1 PSLRA notice was published pursuant to the Private Securities Litigation Reform Act of 1995
 2 (the “PSLRA”) in a national business-oriented wire service on February 18, 2009, by Labaton
 3 and BTKMC on behalf of Plaintiffs New Orleans and MARTA/ATU, which included reference
 4 and explanation of the Boilermakers Action and the PSLRA notice filed on January 12, 2009.
 5 See Berman Decl. Ex. B. This motion is being filed within 60 days from the date of publication
 6 of that January 12, 2009, notice.

7 As set forth in the Boilermakers’ Certification of Securities Class Action Complaint
 8 (“Boilermakers Certification”), which is annexed as Ex. C to the Berman Decl., the Boilermakers
 9 expended approximately \$6,906,509.90 to purchase units of WaMu Mortgage Pass-Through
 10 Certificates Series 2006-AR7 and Series 2007-HY7. See Berman Decl., Ex. C. As set forth in
 11 New Orleans’ Certification of Securities Class Action Complaint (“New Orleans Certification”),
 12 which is annexed as Ex. D to the Berman Decl., New Orleans expended approximately
 13 \$899,741.66 to purchase units of WaMu Mortgage Pass-Through Certificates Series 2005-AR12,
 14 Series 2006-AR14, Series 2006-AR16, Series 2006-AR18 and Series 2006-HY2. Furthermore,
 15 as set forth in MARTA/ATU’s Certification of Securities Class Action Complaint
 16 (“MARTA/ATU Certification”), which is annexed as Ex. E to the Berman Decl., MARTA/ATU
 17 expended approximately \$3,412,334.80 to purchase units of WaMu Mortgage Pass-Through
 18 Certificates Series 2006-AR2, Series 2006-AR12, Series 2006-AR16, Series 2006-AR18, Series
 19 2007-HY2, Series 2007-HY4 and Series 2007-HY7. As of the filing date hereof, the collective
 20 outstanding investments in Certificates of the proposed Lead Plaintiffs have declined in value in
 21 excess of sixty-two percent (62%), thus, resulting in a substantial loss and giving rise to a
 22 compelling financial interest in the relief sought by the putative class herein. By virtue of this
 23 loss, it is respectfully submitted that the Court should appoint the Boilermakers, New Orleans
 24 and MARTA/ATU as Lead Plaintiffs, most capable of adequately representing the interests of
 25 the Class and approve SSLL, Labaton and BTKMC as Lead Counsel, and HBSS as Liaison
 26 Counsel for the Class. SSLL, Labaton, BTKMC, as well as HBSS each have extensive

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1 experience in securities fraud and derivative litigation and have won many important victories
 2 for shareholders who have been injured as a result of securities fraud. *See* Berman Decl., Exs. F,
 3 G, H, I.

4 **II. ARGUMENT**

5 **A. Movants Are The Most Adequate Plaintiffs Under The Securities Act**

6 On December 22, 1995, Congress enacted Public Law 104-67, 109 Stat. 737
 7 (December 22, 1995), entitled the Private Securities Litigation Reform Act of 1995 (the
 8 “PSLRA”), codified at 15 U.S.C. § 77z-1. The PSLRA amends the Securities Act to include a
 9 new Section 27 that, *inter alia*, sets forth a detailed procedure for selecting the lead plaintiff to
 10 oversee class actions brought under the federal securities laws.

11 Section 27(a)(3)(B)(i) of the Securities Act directs the court to appoint as lead plaintiff
 12 “the member or members of the purported plaintiff class that the court determines to be most
 13 capable of adequately representing the interests of class members.” Section 27(a)(3)(B)(iii)
 14 requires a presumption that the most adequate plaintiff:

15 (aa) has either filed the complaint or made a motion in response
 16 to a notice under [the PSLRA];

17 (bb) in the determination of the court, has the largest financial
 18 interest in the relief sought by the class; and

19 (cc) otherwise satisfies the requirements of Rule 23 of the
 20 Federal Rules of Civil Procedure.

21 Section 27(a)(3)(B)(iii), 15 U.S.C. § 77z-1(a)(3)(B)(iii); *see also Richardson v. TVIA, Inc.*, No.
 22 C-06-06304 RMW, 2007 U.S. Dist. Lexis 28406 at *8-9 (N.D. Cal. Apr. 16, 2007) (citing *In re
 23 Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002)).

24 The goal of Congress in enacting this provision was to “empower investors” to “have the
 25 greater control over class action cases.” *See* “Private Securities Litigation Reform Act of 1995 –
 26 Conference Report,” 141 Cong. Rec. S17933-97, at S17956 (daily ed. Dec. 5, 1995).

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1 The proposed Lead Plaintiffs are institutional investors that have suffered substantial
 2 losses as a result of Defendants' alleged wrongful conduct. In order to reduce "lawyer-driven"
 3 litigation, "through the PSLRA, Congress has unequivocally expressed its preference for
 4 securities fraud litigation to be directed by large institutional investors." *Gluck v. CellStar Corp.*,
 5 976 F. Supp. 542, 548 (N.D. Tex. 1997). *See also Sakhrani v. Brightpoint, Inc.*, 78 F. Supp. 2d
 6 845, 850 (S.D. Ind. 1999) ("The PSLRA was enacted with the explicit hope that institutional
 7 investors ... would step forward to represent the class and exercise effective management and
 8 supervision of the class lawyers."). By appointing the Boilermakers, New Orleans and
 9 MARTA/ATU as Lead Plaintiffs in this case, the Court would be fulfilling one of Congress's
 10 major aims in passing the PSLRA, namely giving institutional investors an increased role in
 11 securities class actions.

12 **1. The Movants Have the Largest Financial Interest in the Action**

13 The PSLRA requires a court to adopt a rebuttable presumption that "the most adequate
 14 plaintiff . . . is the person . . . that . . . has the largest financial interest in the relief sought by the
 15 class." 15 U.S.C. § 78u-4(a)(3)(B)(iii); *see also TVIA*, 2007 U.S. Dist. 28406 at *8 (citing
 16 *Cavanaugh*, 306 F.3d at 730). "While the PSLRA does not specify how we should decide which
 17 plaintiff group has the 'largest financial interest' in the relief sought, most courts simply
 18 determine which potential lead plaintiff has suffered the greatest total losses." *Takara Trust v.*
 19 *Molex*, 229 F.R.D. 577, 579 (N.D. Ill. 2005); *see also TVIA*, 2007 U.S. Dist. 28406 at *14
 20 (approximate loss is most determinative).

21 The Boilermakers, New Orleans and MARTA/ATU each have a major financial stake in
 22 this litigation. As set forth more fully in the Boilermakers, New Orleans and MARTA/ATU's
 23 Certifications of Securities Class Action Complaint, each expended substantial amounts in
 24 purchasing the Certificates. *See* Berman Decl., Exs. C, D, E. The Movants' initial investments
 25 in the Certificates owned as of the date of the filing of the instant motion have declined in value
 26 in excess of sixty-two percent (62%), and thus, have declined precipitously from the price that

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HAGENS BERMAN
 SOBOL SHAPIRO LLP
 1301 FIFTH AVENUE, SUITE 2900 • SEATTLE, WA 98101
 TELEPHONE (206) 623-7292 • FACSIMILE (206) 623-0594

each had paid – resulting in substantial financial loss as a result of the wrongful conduct alleged. Plaintiffs are not aware of any other persons who suffered greater losses in connection with the purchase of the Certificates. Thus, the Boilermakers, New Orleans and MARTA/ATU are precisely the type of investors that should be appointed as Lead Plaintiffs in this consolidated action.

2. The Movants Satisfy the Requirements of Rule 23 of the Federal Rules of Civil Procedure

Section 27(a)(3)(B) of the Securities Act further provides that the lead plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. § 77z-1(a)(3)(B). Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

For purposes of appointing the lead plaintiff, “of the four prerequisites to class certification, the focus is only on the typicality (Rule 23(a)(3)) and adequacy (Rule 23(a)(4)) requirements.” *Fields v. Biomatrix, Inc.*, 198 F.R.D. 451, 456 (D.N.J. 2000) (citation omitted); *Siegall v. Tibco Software, Inc.*, 2006 U.S. Dist. Lexis 26780, at *14-15 (N.D. Cal. 2006) (“In the context of determining the appropriate lead plaintiff under the PSLRA, the requirements of ‘typicality’ and adequacy of representation are the key factors.”); *see also Gluck v. CellStar Corp.*, 976 F. Supp. at 546. As a general rule, a plaintiff’s claim meets the typicality requirement if it is both legally and factually similar and arises out of the same events or course of conduct that gives rise to the claims of the other class members. This does not require that the claims be identical, but there must be some common question of fact or law. *See In re Independent Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 480 (S.D.N.Y. 2002) (citing *In re Drexel Burnham*

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HAGENS BERMAN
SOBOL SHAPIRO LLP

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TELEPHONE (206) 623-7292 • FACSIMILE (206) 623-0594

1 *Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992)). This Court's analysis of any other
 2 requirements of Rule 23 as it relates to class certification should be deferred until the Lead
 3 Plaintiffs move for class certification. *Schriver v. Impac Mortg. Holdings, Inc.*, 2006 U.S. Dist.
 4 Lexis 40607, at *15-16 (C.D. Cal. May 1, 2006) ("At the lead plaintiff appointment stage, the
 5 Rule 23 inquiry is not as searching as it would be on a motion for class certification; the
 6 prospective lead plaintiff need only make a prima facie showing that it meets the typicality and
 7 adequacy factors.").

8 Here, the Boilermakers, New Orleans and MARTA/ATU's claims are typical, if not
 9 identical, to the claims of the members of the Class. As set forth above, the losses suffered by
 10 the Boilermakers, New Orleans and MARTA/ATU resulted from Defendants' common course of
 11 conduct which violated the Securities Act by publicly disseminating materially misstatements in
 12 the Registration Statements. Thus, the Boilermakers, New Orleans and MARTA/ATU satisfy
 13 the typicality requirement.

14 Further, Section 27(a)(3)(B)(iii) of the Securities Act directs the Court, in evaluating the
 15 adequacy of a proposed lead plaintiff, to limit its inquiry to the existence of any conflicts
 16 between the interests of the proposed representative and members of the class, and allows the
 17 lead plaintiff to retain counsel of their choice to represent the Class "subject to the approval of
 18 the court." See Securities Act § 27(a)(3)(B)(v), 15 U.S.C. 77z-1(a)(3)(B)(v). The adequacy
 19 standard is met where (1) the named plaintiff has interests common with the Class' interests; and
 20 (2) the representatives will vigorously pursue the interests of the Class through qualified counsel.
 21 *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000) (citing *Drexel*,
 22 960 F.2d at 291).

23 As set forth above, the Boilermakers, New Orleans and MARTA/ATU's interests are
 24 clearly aligned with the members of the Class, and there is no evidence of any antagonism
 25 between their interests and those of the Class. The Boilermakers, New Orleans and
 26 MARTA/ATU share numerous common questions of law and fact with the members of the

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1 Class, and their claims are typical of the members of the Class. Further, the proposed Lead
 2 Plaintiffs have retained competent counsel to represent it in this case. Thus, the alignment of
 3 interests between the proposed Lead Plaintiffs and the Class and the skill of the proposed Lead
 4 Plaintiffs' chosen counsel favor granting the instant motion.²

5 **B. The Court Should Approve The Lead Plaintiffs' Choice of Lead Counsel**

6 The amendments to the Securities Act vest authority in the lead plaintiff to select and
 7 retain lead counsel, subject to the approval of the court. *See* Securities Act § 27(a)(3)(B)(v), 15
 8 U.S.C. § 77z-1(a)(3)(B)(v). A court should not disturb the lead plaintiff's choice of counsel
 9 unless necessary to protect the interests of the plaintiff class. In the present case, the three
 10 proposed Lead Plaintiffs have retained SSLL, Labaton and BTKMC, as well as Proposed Liaison
 11 Counsel HBSS, as Lead Counsel to pursue this litigation on their behalf. As stated above, each
 12 of these firms have extensive experience in both securities and complex commercial litigation.
 13 As a result, the Proposed Lead Plaintiffs' choice of counsel should not be disturbed.

14 **III. CONCLUSION**

15 For all the foregoing reasons, the Plaintiffs respectfully request that the Court grant the
 16 instant motion and:

17 i) appoint the Boilermakers, New Orleans and MARTA/ATU as Lead Plaintiffs in
 18 the above-captioned action pursuant to Section 27(a)(3)(B) of the Securities Act, 15 U.S.C.
 19 § 77z-1(a)(3)(B);

20 ii) approve the Lead Plaintiffs' choice of counsel and appoint SSLL, Labaton and
 21 BTKMC as Lead Counsel, and HBSS as Liaison Counsel, pursuant to Section 27(a)(3)(B)(v) of
 22 the Securities Act, 15 U.S.C. § 77z-1(a)(3)(B)(v); and

23 iii) grant such other and further relief as the Court may deem just and proper.

24 ² It is obvious that the requirements of numerosity and the common questions of law or fact
 25 are met as all purchases arose as a result of Defendants' material misstatements and omissions in
 26 the Registration Statements. Thousands of Certificates valued in the millions of dollars were
 sold to many thousands of investors.

DATED this 16th day of March, 2009.

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Steve W. Berman
Steve W. Berman, WSBA #12536
Reed R. Kathrein
1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

Liaison Counsel for Plaintiffs and for the Class

Joel P. Laitman
Christopher Lometti
Daniel B. Rehns
SCHOENGOLD SPORN LAITMAN & LOMETTI, P.C.
19 Fulton Street, Suite 406
New York, NY 10038
Telephone: (212) 964-0046
Facsimile: (212) 267-8137

Counsel for Plaintiff Boilermakers and Proposed Lead Counsel for the Class

Joseph A. Fonti
Jonathan Gardner
LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005
Telephone: (212) 907-0700
Facsimile: (212) 818-0477

John A. Kehoe
Saran Nirmul
Naumon A. Amjad
BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19807
Telephone: 610-667-7706
Facsimile: 610-667-7056

Counsel for Plaintiffs New Orleans and MARTA/ATU and Proposed Lead Counsel for the Class

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Naumon A. Amjed
namjed@btkmc.com

David M. Balabanian
david.balabanian@bingham.com

Michael H. Barr
mbarr@sonnenschein.com

Walter E. Barton
gbarton@karrtuttle.com

Steve W. Berman
steve@hbsslaw.com

Frank Busch
frank.busch@bingham.com

Kevin P. Chavous
kchavous@sonnenschein.com

Leslie D. Davis
ldavis@sonnenschein.com

Brian C. Free
bcf@hcmp.com

Reed R. Kathrein
reed@hbsslaw.com

Frank R. Schirripa
frank@spornlaw.com

Joel P. Laitman
joel@spornlaw.com

Jonathan Gardner
jgardner@labaton.com

Joseph A. Fonti
jfonti@labaton.com

John A. Kehoe
jkehoe@btkmc.com

Bruce E. Larson
blarson@karrtuttle.com

Mike Liles, Jr.
mliles@karrtuttle.com

Sharan Nirmul
snirmul@btkmc.com

Louis D. Peterson
ldp@hcmp.com

Kenneth J. Pfahler
kpfaehler@sonnenschein.com

Dennis H. Walters
dwalters@karrtuttle.com

Robert D. Stewart
stewart@kiplinglawgroup.com

Timothy M. Moran
moran@kiplinglawgroup.com

Christopher E. Lometti
chris@spornlaw.com

Daniel B. Rehns
Daniel@spronlaw.com

Stephen M. Rummage
steverummage@dwt.com

Steven Caplow
stevencaplow@dwt.com

Paul Scarlato
pscarloto@labaton.com

Serena Richardson
srichardson@labaton.com

Executed this 16th day of March, 2009, in Seattle, Washington.

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Steve W. Berman
Steve W. Berman

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SOBOL SHAPIRO LLP

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